

UNITED STATES OF AMERICA  
Before The  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

RECEIVED  
JUN 8 3 40 PM '99  
POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

Complaint on Post E.C.S.

)

Docket No. C99-1

OFFICE OF THE CONSUMER ADVOCATE  
COMMENTS IN RESPONSE TO P.O. RULING NO. C99-1/2  
(June 8, 1999)

---

The Office of the Consumer Advocate (OCA) hereby files comments in response to Presiding Officer's Ruling No. C99-1/2. OCA will address two subjects raised in the Ruling: (1) the suitability of Special Rules of Practice employed in Docket No. R97-1 to the instant complaint case and (2) the need for protective conditions in the instant proceeding and the type of conditions (if any) that may be imposed. This pleading also addresses a related subject: the need for, and proper scope of, discovery. It is appropriate to comment on discovery issues at this time since the Postal Service has raised a general objection to all interrogatories submitted by United Parcel Service (UPS)<sup>1</sup> and specific objections to most of the interrogatories filed.<sup>2</sup> The Commission declares in Order No. 1239,<sup>3</sup> in which it denies the Postal Service's motion to dismiss

---

<sup>1</sup> "Interrogatories and Requests for Production of Documents of United Parcel Service to United States Postal Service (UPS/USPS-1 through UPS/USPS-24)," filed May 14, 1999.

<sup>2</sup> "Objection of the United States Postal Service to United Parcel Service Interrogatories UPS/USPS-1-24" (Objection), filed May 25, 1999.

<sup>3</sup> "Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings," issued May 3, 1999.

the complaint, that formal proceedings are currently in place for the purpose (among other things) of “adduc[ing] facts through discovery.”<sup>4</sup>

#### Special Rules of Practice

It is OCA's view that the Special Rules of Practice now used routinely in rate and classification proceedings should be applied in the instant docket. The Special Rules are the most recent version of rules culminating from a long, evolutionary process. They achieve greater efficiency and expedition in the conduct of cases than many of the permanent rules of practice. There is, however, one minor change to the language of Special Rule 1.A that OCA would suggest.

Special Rule 1.A provides that, “A participant's case-in-chief shall be in writing and shall include the participant's . . . rebuttal, if any, to the United States Postal Service's case-in-chief.” At a later stage, an opportunity is given “for the Postal Service to present surrebuttal evidence.” The chronology of events in a complainant-initiated case does not follow this model. In the instant proceeding, for example, the Presiding Officer has set July 27, 1999, as the date for UPS to file any evidence upon which it intends to rely. This filing will constitute the first presentation of a “direct” case by any participant. Since the Postal Service has not yet filed any evidence upon which it intends to rely, there is no Postal Service case to rebut at the time that UPS files its direct evidence. If the Postal Service does choose to file evidence to refute that presented in UPS' direct case, the Postal Service evidence will function as rebuttal, not

---

<sup>4</sup> *Id.* at 22.

surrebuttal evidence. Language conforming to this sequence of events should be substituted in the Special Rules.

### Protective Conditions

P.O. Ruling No. C99-1/2 solicited participant input on the stringency of protective conditions that may be needed in the instant proceeding. It is OCA's view that the Commission should limit the application of protective conditions only in those instances in which harm to the Postal Service resulting from release of the requested information is clearly documented by the Postal Service. It must not be forgotten that the burden of proof for imposition of protective conditions is on the Postal Service.<sup>5</sup> In the absence of specific information demonstrating that the provision of data responses will cause harm to the Postal Service or other entities, the Commission should presume that unfettered access to requested information is appropriate in all cases.<sup>6</sup> The Commission should

---

<sup>5</sup> Under the Federal Rules of Civil Procedure, for example, the party seeking to limit discovery must file a motion and certification that the "movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. Proc. 26(c). The motion will be granted only "for good cause shown." *Id.* It does not appear that the Postal Service has attempted to resolve its discovery dispute with UPS informally. Furthermore, the vague claims of harm alleged in the Postal Service's Objection would certainly not satisfy Fed. R. Civ. Proc. 26(c). See also, *In re Unisys Corp. Retiree Medical Benefits Erisa Litigation*, 1994 WL 6883 [at 4] (E.D. Pa. 1994): "When a party withholds a document based on . . . privilege . . . the burden is on the party asserting the privilege to demonstrate that the privilege has been properly invoked;" and *Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D. Kan. 1994) (Citations omitted): "The burden of demonstrating the existence of a privilege is on the party claiming the privilege. The party claiming the privilege must supply the court with sufficient information to enable the court to determine that each element of the privilege is satisfied. A failure of proof as to any element of the privilege causes the claim of privilege to fail. A blanket claim of the existence of the privilege is insufficient to meet the burden of proof. Plaintiff, beyond making a blanket claim of privilege or confidentiality, has failed to demonstrate how each element of the privilege is satisfied. Blanket claims of privilege or confidentiality are clearly insufficient to protect materials from disclosure."

<sup>6</sup> OCA suggests that general and vague claims of "commercial sensitivity" such as those contained in the Postal Service's Objection would not satisfy Fed. R. Civ. Proc. 26(c) and should not be accepted by the Commission in the absence of a more concrete demonstration of harm.

impose restrictions on access only when the harm contended by the Postal Service is substantiated.

Need for, and Proper Scope of, Discovery

Pursuant to Order No. 1239, which instituted a formal proceeding and gave "interested parties [the opportunity] to adduce additional facts through discovery," UPS filed a set of 24 interrogatories. The Postal Service responded with "[a] general objection to all of the interrogatories" and additional specific objections to almost all of the interrogatories. The Postal Service's general objection is wholly unfounded and repudiates the course of action described in Order No. 1239. The numerous specific objections likewise are obstructing any progress in resolving UPS' complaint.

The Postal Service's decision to proceed with an electronic message delivery service for which the Service believes it need not account to any governmental entity raises important issues that should not be resolved in a vacuum. OCA believes that many of UPS' interrogatories are a valuable starting point for determining the nature of Post E.C.S. and whether it falls into the ambit of the Commission's authority. UPS' interrogatories pose questions OCA would itself pose if UPS had not done so first. Consequently, OCA has a strong interest in the Postal Service's responses to the questions. In addition, OCA is now in the process of formulating its own discovery questions, and naturally would prefer to receive responses rather than objections.

The Postal Service's general objection that discovery is premature is without merit. The Service evidently takes the position that it will not answer *any* questions because there are *some* questions it believes are improper. Citing P.O. Ruling No. C96-1/1, however, the Postal Service implicitly acknowledges that information

concerning “factual matters that bear directly on the ‘postal’ or ‘nonpostal’ character” of the service in contention are legitimate subjects of inquiry. Any of UPS’ questions that are intended to adduce such information are clearly within the ambit of proper discovery, as articulated by the Commission in the Pack & Send proceeding.<sup>7</sup> As no specific objections were interposed, the Postal Service should furnish answers to such questions immediately.

The Postal Service also raised a number of specific objections to UPS’ interrogatories. Presumably some or all of the objections will be the subject of a motion to compel. At this time, however, OCA comments that the breadth of the objections interferes with getting the facts out on the table so that the Commission can move forward in this Docket.

The Postal Service has made use of one or more of the following specific objections: commercial sensitivity; relevance; jurisdiction; vague, overbroad, and burdensome; and privilege. Commercial sensitivity, which the Service frequently invokes, is not an objection to production but rather an argument for limited circulation and use of material produced. As noted earlier, the OCA urges the Commission to reject vague and general claims of the need for commercial protections that are not backed up by specific showings of genuine harm. Data produced should be under a protective order only if truly necessary.

Relevance is also frequently invoked by the Postal Service. Given that this proceeding is concerned with the nature of Post E.C.S., whether it falls within the ambit

---

<sup>7</sup> Docket No. C96-1.

of the Commission's authority, and the impact Post E.C.S. service may have on other postal services, discovery should be given a broad scope. Overbroad use of relevance as an objection will frustrate the ability of the participants and the Commission to resolve these issues.<sup>8</sup>

The remaining objections of vague, overbroad, and burdensome; jurisdiction; and privilege were more sparingly invoked. The first should be an occasion for the Postal Service and UPS to consult informally to clarify the requests and to reduce burden when possible. Jurisdiction is not an objection, *per se*, but a repetition of the Postal Service's underlying view that the complaint should be dismissed. Order No. 1239 makes clear, however, that discovery is to go forward and evidence is to be filed before the Commission makes a final determination on its jurisdiction. Finally, privilege (whether attorney-client or attorney work product) may be claimed for responsive documents, but the Postal Service should provide a privilege log describing, *inter alia*, the nature of the documents, the persons involved, the date, and the subject, all so that the claim of privilege may be fairly assessed.<sup>9</sup>

---

<sup>8</sup> Relevance has been construed liberally by the Supreme Court. For example, in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), the Court stated: "relevant to the subject matter involved in the pending action" - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case," *see also*, *Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D. Kan. 1993) (Citations omitted): "Relevancy has been defined as encompassing any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. A request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of this action. Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of this action."

<sup>9</sup> *E.g.*, *In re Symington*, 211 B.R. 520, 521 (U.S. Bankruptcy Court, D. Md. 1997): "[A]ny documents withheld on the grounds of privilege [must] be identified by type, subject matter, date, author, addressee, other recipient(s) and the relationship among them and that the nature of the claimed privilege be stated."

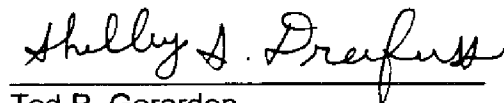
While disputes over discovery are not uncommon, OCA urges all participants to cooperate in providing the Commission with sufficient facts to proceed under the direction of Order 1239.

Conclusion

In conclusion, the Commission should adopt the Special Rules of Practice now commonly used in Commission proceedings, with the minor change suggested by OCA. With respect to protective conditions for material produced in discovery, the Commission should refrain from imposing such conditions in the absence of the Postal Service establishing good cause for restrictions on the release of information. The Postal Service should provide immediate answers to any interrogatories or parts of interrogatories for which no specific objection has been lodged.

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE

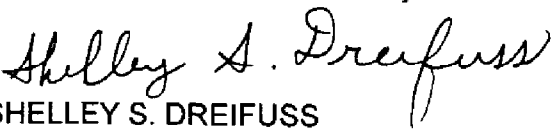
A handwritten signature in cursive script, reading "Shelley S. Dreifuss", written over a horizontal line.

Ted P. Gerarden  
Director

Shelley S. Dreifuss  
Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.

  
SHELLEY S. DREIFUSS  
Attorney

Washington, D.C. 20268-0001  
June 8, 1999